85-293

No.

Supreme Court, U.S.
FILED
AUG 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OZARK AIR LINES, INC.,
Petitioner,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT B. VINING, JR.*
DONALD J. MEYER
VINING & MEYER, P.C.
7751 Carondelet Avenue, Suite 606
Clayton, Missouri 63105
(314) 726-3315
Attorneys for Petitioner

**Counsel of Record*

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED

1) Whether, under the principles governing the judicial review of labor arbitration awards set forth by this Court 25 years ago in the Steelworkers Trilogy and, specifically in *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960), requiring the reviewing court to determine whether the award draws its essence from the collective bargaining agreement, does an arbitrator appointed by the National Mediation Board under the provisions of the Railway Labor Act exceed the scope of his jurisdiction:

a) by requiring as a condition precedent to enforcement of unambiguous contract language that the party who drafted the unambiguous language tell the other party what it meant;

b) by refusing to enforce unambiguous contract language under circumstances where, after examining the bargaining history, the arbitrator was unable to find an intent of the parties inconsistent with the unambiguous contract language;

c) by refusing to enforce unambiguous contract language drafted by the Company and accepted by the Union simply because, in the opinion of the arbitrator, the Union did not obtain what it attempted to achieve in negotiations.

2) Whether the equally divided en banc Order of the U.S. Court of Appeals for the Eighth Circuit vacating the panel decision of that Court and affirming the judgment of the District Court enforcing a labor arbitration award granting the Union through arbitration what it was unable to attain in negotiations, conflicts with the decision of the U. S. Court of Appeals for the Second Circuit in *Torrington Company v. Metal Products*

Workers Union Local 1645, UAW, AFL-CIO, 362 F.2d 677 (2nd Cir. 1966) vacating an arbitrator's award because it improperly granted to a union through arbitration a benefit which it was unsuccessful in obtaining through contract negotiations.

PARTIES BELOW

Parties to this case in the court below are those listed in the caption of this petition.[1] The Union is the representative of the airline pilots employed by Ozark Air Lines, Inc. The Union is a party to this case as the representative of two grievants, Captains Behnken and Gerber who are pilots employed by Ozark.

---

[1] Ozark Air Lines, Inc. is a wholly owned subsidiary of Ozark Holdings, Inc.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties Below	ii
Table of Contents	iii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutory Provisions	2
Statement of the Case	3
A. Background	3
B. The Underlying Dispute	3
C. The Decision of the Arbitrator	4
Reasons for Granting the Writ	6
1. The Equally Divided En Banc Decision of the United States Court of Appeals For the Eighth Circuit is Inconsistent With the Principles Governing Judicial Review of Labor Arbitration Awards, is Contrary to the Expressed Purpose of The Railway Labor Act and Further Illustrates the Judicially Recognized Fact That the Eighth Circuit Has Effectively Eliminated Judicial Review of Arbitration Awards	6
2. The Five To Five En Banc Decision of the Eighth Circuit In The Present Case Enforcing An Arbitration Award Which Grants The Union Through Arbitration What It Was	

Unable To Achieve In Negotiations, Is In Direct Conflict With The Torrington Decision of The Second Circuit Prohibiting An Arbitrator From Granting A Union In Arbitration What It Was Unsuccessful In Obtaining Through Negotiations 10

Conclusion 13

Appendices A-1

TABLE OF AUTHORITIES

Cases:

Detroit Coil Co. v. IAM Lodge 82, 594 F.2d 575 (6th Cir. 1979), *cert. denied,* 444 U.S. 840 (1979) 7

Loveless v. Eastern Air Lines, 681 F.2d 1272 (11th Cir. 1982) 6

Rainbow Glass Co. v. Local Union No. 610, 663 F.2d 814 (8th Cir. 1981) 11

Riceland Foods v. United Brotherhood of Carpenters and Carpenters and Joiners of America, 737 F.2d 758 (8th Cir. 1984) and 83-1619 (8th Cir. Dec. 10, 1984) 8

Sears v. Teamsters Local 243, 683 F.2d 154 (6th Cir. 1982), *cert. denied,* 460 U.S. 1023 (1983) 7

St. Louis Theatrical Company v. St. Louis Theatrical Brotherhood Local 6, 715 F.2d 405 (8th Cir. 1983). 7

Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677 (2nd Cir. 1966) 10

United Electrical, Radio and Machine Workers of America Local 1139 v. Litton Microwave Cooking Products, 728 F.2d 970 (8th Cir. 1984) 9

United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960) 6, 8

W. R. Grace & Co. v. Local 759 International Union of Rubber Workers, 103 S.Ct. 2177 (1983) 9

Statutory Provisions:

28 U.S.C. §1254(1) 2

45 U.S.C. §151a 2

§153 First (q) 2, 3, 6

§184 3

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OZARK AIR LINES, INC.,
Petitioner,

vs.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner Ozark Air Lines, Inc., respectfully prays that a writ of certiorari issue to review the equally divided en banc Order of the United States Court of Appeals for the Eighth Circuit, vacating the prior panel decision of that Court and affirming the judgment of the United States District Court for the Eastern District of Missouri, Eastern Division.

OPINIONS BELOW

The equally divided en banc Order of the Court of Appeals vacating the panel opinion is set out at Appendix A. The panel opinion of the Court of Appeals, with the dissent of Judge McMillian, affirming the District Court Order and Opinion, reported at 744 F.2d 1347 (1984) is set out at Appendix B. The

Order, and Memorandum and Order of the District Court are set out at Appendices C and D respectively.

JURISDICTION

The equally divided Order of the Court of Appeals en banc affirming the judgment of the District Court was entered May 21, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1)

STATUTORY PROVISIONS

The purpose of the Railway Labor Act, 45 U.S.C. §151a is as follows:

> The purposes of the Chapter are: (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions... (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

With respect to the scope of judicial review of arbitration awards rendered pursuant to the provisions of the Railway Labor Act, 45 U.S.C. §153 First (q), the Act provides in relevant part:

> (q) If ... and carrier, ... is aggrieved by any of the terms of an award...then such ...carrier may file in any United States district court...a petition for review of the division's order. On such review, the findings and order of the division shall be conclusive on the parties, except that the order of the division may be set aside, in whole or in part, or remanded to the division, for failure of the division to comply with the requirements of this chapter, for failure of the order to conform, or confine itself, to matters within the scope of the division's jurisdiction, or for fraud or corruption by a member of the division making the order.

STATEMENT OF THE CASE

A. Background

Petitioner, Ozark Air Lines, Inc., (hereinafter Ozark) commenced this action in the District Court against the Air Line Pilots Association International, (hereinafter ALPA) to vacate an arbitration award of the Ozark Air Line Pilots' System Board of Adjustment (hereinafter the Board). Ozark moved for Summary Judgment to vacate the arbitration award and ALPA filed a Cross Motion for Summary Judgment to enforce it. Jurisdiction for Ozark's Complaint was based on the Railway Labor Act, 45 U.S.C. §§153 First (q) and 184. The District Court granted ALPA's Cross Motion for Summary Judgment, hereby enforcing the arbitration award and denying Ozark's motion to vacate.

Ozark appealed. The panel majority composed of Judges Bright and Floyd R. Gibson affirmed thereby declining to vacate the arbitration award. The third panel member, Judge McMillian, dissented stating that the Board's award was contrary to the contract language and therefore could not be said to draw its essence from the collective bargaining agreement. On rehearing en banc, the Court was evenly divided, five to five.

B. The Underlying Dispute.

The dispute centers around the interpretation of Section 15E of the Contract, set out at Appendix E, which provides that:

> When the Company determines that an employee has an occupational injury, such employee shall be eligible for occupational injury pay.

Historically, Ozark has made the determination of whether an occupational injury occurred based on whether the employee making a claim had incurred a compensable injury under state workers' compensation law. If Ozark determined that an injury was compensable under state law, it would grant occupational

pay. If it determined that an injury was not compensable under state law, it would grant regular sick pay. After reviewing the claims of Captains Behnken and Gerber, Ozark determined there had been no "accidental occurrence" and, therefore, under Missouri Workers' Compensation Law neither of them had incurred a compensable injury. They were paid from their regular sick pay accounts. Captains Behnken and Gerber grieved and their case was arbitrated before the Ozark Air Lines Pilots System Board of Adjustment. The arbitrator was appointed by the National Mediation Board pursuant to the provisions of the Railway Labor Act.

C. **The Decision of the Arbitrator.**

The Arbitrator expressly recognized that the merits of the grievances before him turned on the meaning of the language in Paragraph 15E of the Contract, "When the Company determines that an employee has an occupational injury...". (Appendix F, p. A-33) With respect to whether that language was clear on its face, the Arbitrator stated:

> It is a fundamental rule of agreement interpretation that the plain meaning of contract language must be followed by the interpreter of that language. Clear and unambiguous language must be followed without resort to parol evidence in the form of oral or written statements which would alter or vary the terms of the language. The Carrier relies heavily upon this rule and the language under scrutiny here tends to support the Carrier's argument. On its face the language vests in the Carrier the authority to determine whether an employee has suffered an occupational injury without restricting the Carrier to a specific standard or criterion in making such determination.
>
> (Appendix F, p. A-33)

The Arbitrator did not stop at that point. He went on to consider the bargaining history to determine if it would prove some other meaning to the facially unambiguous contract.

The bargaining history disclosed that prior to the 1975 negotiations between Ozark and ALPA, Ozark would wait for a determination from the Missouri Division of Workers' Compensation before paying occupational injury leave. As part of the bargaining history, the Arbitrator considered the testimony of the Union negotiator that ALPA intended to achieve two goals in the 1975 negotiations, (1) to expedite the processing of its claims for occupational injury pay, and (2) to sever all ties between occupational injury pay under Section 15E of the agreement and compensability under workers' compensation law. Regarding the first goal, it is undisputed that the processing of disputes was expedited by Ozark making the decision of whether an employee had an occupational injury rather than have the employee wait until a decision was rendered by the state agency. The Arbitrator also considered the testimony of the Ozark negotiator to the effect that Ozark never intended by the change in language to abandon its practice of making eligibility for occupational injury pay contingent upon the injury being compensable under workers' compensation law. Ozark intended there be no change in the standard for determining eligibility for occupational injury pay. (Appendix F, p. A-37)

After examining this bargaining history, the Arbitrator concluded that the meaning of Section 15E of the Contract was not conclusively established by the bargaining history. (Appendix F, p. A-38) The Arbitrator construed the unambiguous Contract language against Ozark on the basis that it was drafted by Ozark. The Arbitrator justified this on the basis that, in his opinion, ALPA was seeking to sever the relationship between occupational injury pay under the labor contract and compensability under workers' compensation law and Ozark failed to explain its proposal to ALPA other than to say that Ozark would make the determination. (Appendix F, p. A-38)

REASONS FOR GRANTING THE WRIT

1. The Equally Divided En Banc Decision Of The United States Court Of Appeals For The Eighth Circuit Is Inconsistent With The Principles Governing Judicial Review Of Labor Arbitration Awards, Is Contrary To The Expressed Purpose Of The Railway Labor Act And Further Illustrates The Judicially Recognized Fact That The Eighth Circuit Has Effectively Eliminated Judicial Review Of Arbitration Awards.

Twenty-five years ago in the Steelworkers Trilogy, and specifically in *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), this Court set forth the principles of law to be followed by the courts in reviewing arbitration awards. In that regard, this Court stated:

> Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

The provisions of the Railway Labor Act, 45 U.S.C. §153 First (q), concerning review of arbitration awards are merely a statutory codification of substantive grounds for review of arbitration awards in other areas of labor law. Where, as here, there was no contention of fraud or corruption of a member of the board, the proper standard of review under the Railway Labor Act is whether the decision of the arbitrator draws its essence from the contract. *Loveless v. Eastern Air Lines,* 681 F.2d 1272 (11th Cir. 1982).

In the instant case, the arbitrator admitted that "On its face the language (of Section 15E of the contract) vests in the carrier (Ozark) the authority to determine when an employee has suf-

fered an occupational injury without restricting the Carrier to a specific standard or criterion in making the determination". The arbitrator further admitted that the meaning of Section 15E of the contract was not conclusively established by the bargaining history.

Terms used in a labor agreement must be given their ordinary meaning absent evidence indicating the parties intended some other meaning. *Detroit Coil Co. v. IAM Lodge 82,* 594 F.2d 575 (6th Cir. 1979), cert. denied, 444 U.S. 840 (1979). The arbitrator found that the bargaining history failed to conclusively establish any other meaning. Absent tensions between sections of the agreement or an ambiguity within a section, an "...agreement is not susceptible to any construction beyond its plain meaning". *St. Louis Theatrical Company v. St. Louis Theatrical Brotherhood Local 6,* 715 F.2d 405, (8th Cir. 1983). In the instant case there is no evidence of tensions between sections of the agreement or ambiguity within a section. At this point it was the arbitrator's obligation to enforce the unambiguous language of the contract. By refusing to do so the arbitrator manifested his infidelity to that obligation.

The arbitrator exceeded his jurisdiction by placing on the party that drafted the language in question the requirement of telling the other party what it meant as a condition precedent to its enforcement. The contract does not place such a requirement on the parties. In *Sears v. Teamsters Local 243,* 638 F.2d 154 (6th Cir. 1982), cert. denied 460 U.S. 1023 (1983) the Court refused to enforce an arbitration award under circumstances similar to this case. In Sears the labor agreement gave the employer the right to subcontract just like the contract in the instant case gives Ozark the right to determine whether an occupational injury occurred. In Sears the arbitrator recognized that the bargaining agreement on its face authorized Sears to subcontract in the interest of efficiency and economy. In the present case the arbitrator acknowledged that the language, on its face, gave Ozark the authority to determine whether an employee has suffered an occupational injury without restric-

tion. In Sears, the arbitrator applied a balancing test to determine whether the benefit to the company from subcontracting outweighed the detriment to the union. The Court concluded that the arbitrator exceeded his authority by inferring limitations on subcontracting beyond those contained in the collective bargaining agreement. In the present case the arbitrator placed on Ozark, as a condition precedent to enforcing unambiguous language, the obligation of explaining to the ALPA negotiators that the language did not preclude Ozark from relying on compensability under workers compensation laws in determining whether an occupational injury occurred. By placing that requirement on Ozark, the arbitrator went beyond interpreting the contract and proceeded to dispense his own brand of industrial justice, thereby obligating the reviewing court to refuse enforcement of the award. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra.*

The arbitration in this case was conducted pursuant to the provisions of the Railway Labor Act, the express purpose of which is to provide for the prompt and orderly settlement of disputes over pay and working conditions. The arbitrator's decision conflicts with this expressed statutory purpose. If, as a condition precedent to enforcement of unambiguous contract language, the Ozark negotiator must tell the ALPA representative which of the Union's objectives the unambiguous language does not achieve, the statutory purpose of providing for the orderly settlement of disputes will not be served. Such a requirement which was never agreed to by the parties would tend to inject chaos rather than order into the collective bargaining process. Therefore, the award of the arbitrator not only fails to derive its essence from the contract, but it is in direct conflict with the purpose of the Railway Labor Act which is to provide for an orderly method of settling disputes.

The enforcement of the arbitration award in this case is the product of an evenly divided Court en banc. Recently, the Eighth Circuit enforced another arbitration award by an evenly divided Court en banc. *Riceland Foods v. United Brotherhood*

of Carpenters and Joiners of America, 737 F.2d 758 (8th Cir. 1984) and 83-1619 (8th Cir. Dec. 10, 1984). The en banc ruling in Riceland Foods was issued by Order without an opinion just as it was in the present case. In a recent five to four en banc decision enforcing an arbitration award, *United Electrical, Radio and Machine Workers of America Local 1139 v. Litton Microwave Cooking Products,* 728 F.2d 970 (8th Cir. 1984), the five judge majority stated the following with regard to its understanding of the standard of review of arbitration decisions in the federal courts:

> The Supreme Court has recently reminded us that the courts may set aside labor-arbitration awards only in rare circumstances.

The reference to the recent Supreme Court decision was to *W. R. Grace & Co. v. Local 759 International Union of Rubber Workers,* 103 S.Ct. 2177, 2182, (1983). The W. R. Grace decision places no limitation on reviewing courts on the number or frequency of times that an arbitration award can be set aside. Whether it be a rare circumstance, as the majority has stated in Litton, or a frequent occurrence, should depend solely on whether the award derives its essence from the contract. The four dissenting judges concluded that the five judge majority's "rare circumstances" approach in the Litton case did damage to the established principles of arbitration law and effectively eliminated any judicial review over the concededly broad powers of arbitrators. *United Electrical, Radio and Machine Workers of America Local 1139 v. Litton Microwave Cooking Products, supra* at 974.

This case presents the vehicle by which the Court can clarify the principles governing review of arbitration awards previously stated in Enterprise Wheel and thereby preserve the integrity of the arbitration process. The need for such clarification is evidenced by the two recent evenly divided en banc decisions concerning the scope of review of arbitration awards in Riceland and the present case. The seriousness of the matter

and need for clarification was aptly stated by the four judge minority opinion in the five to four en banc Litton decision that the Court had effectively eliminated "...judicial review over the concededly broad powers of arbitrators". By granting Ozark's petition in this case the Court can reinstate judicial review of arbitration awards in the Eighth Circuit.

2. The Five To Five En Banc Decision Of The Eighth Circuit In The Present Case Enforcing An Arbitration Award Which Grants The Union Through Arbitration What It Was Unable To Achieve In Negotiations, Is In Direct Conflict With The Torrington Decision Of The Second Circuit Prohibiting An Arbitrator From Granting A Union In Arbitration What It Was Unsuccessful In Obtaining Through Negotiations.

The arbitrator rejected Ozark's argument that the Union was trying to get through arbitration what it was unsuccessful in obtaining through negotiations on the basis of his finding that the Union's negotiator believed he had achieved the goal of severing all ties between occupational injury pay under the contract and compensability of the injury under workers' compensation laws. However, the arbitrator failed to point to any provision of the contract by which the Union accomplished this goal. That's because no such contract provision exists notwithstanding the fact that the subject was raised by the Union in negotiations. The Second Circuit has dealt directly with this point in *Torrington Co. v. Metal Products Workers Local 1645,* 362 F.2d 677, 681 (2nd Cir. 1966), where the Court stated:

> We cannot accept this interpretation of the negotiations. In the first place, as Judge Clarie stated, labor contracts generally state affirmatively what conditions the parties agree to, more specifically, what restraints the parties will place on management's freedom of action. While it may be appropriate to resolve a question never raised during negotiations on the basis of prior practice in the plant or industry, it is quite another thing to assume that the contract confers a specific benefit when that benefit was

discussed during negotiations but omitted from the contract.

In our opinion, the Union by pressing this grievance has attempted to have "added" to the 1964 agreement a benefit which it did not think sufficiently vital to insist upon during negotiations for the contract which ended a long and costly strike. We find this sufficiently clear from the facts as found by the arbitrator to agree with the district court that the arbitrator exceeded his authority by ruling that such a benefit was implied in the terms of that agreement.

Torrington has been cited with approval in *Rainbow Glass Co. v. Local Union No. 610,* 663 F.2d 814, 817 (8th Cir. 1981), where a three judge panel stated:

In the instant case the silence of the current bargaining agreement on the question of Copeland's seniority rights rendered the intent of the parties on this matter ambiguous. Resort to the bargaining history here only heightens the ambiguity since the parties failed to discuss this issue during negotiations of that agreement. In his decision, the arbitrator noted that

> (i)n the negotiation of the current contracts, no discussion was had about Grievant's right to seniority. Neither the Company nor the Union brought up the subject. Either could have. The parties were evidently satisfied that Grievant was a 'temporary employee', not entitled to fringe benefit contributions. But the issue of his seniority rights have (sic) never been raised....

Thus, it is clear that this situation is not one in which the parties considered the issue during contract negotiations and deliberately omitted it from the contract. In such a case, an arbitrator could not assume that the contract conferred a specific benefit, since "labor contracts generally

state affirmatively" the conditions on which the parties agree. See Torrington Co. v. Metal Products Workers Local 1645, 362 F.2d 677, 681, 62 LRRM 2495 (2d Cir. 1966).

Although Torrington was cited with approval by a three judge panel in Rainbow Glass, it now appears that the Court en banc is no longer willing to follow the rationale of Torrington in determining whether an arbitration decision derives its essence from the collective bargaining agreement.

The simple fact is that during negotiations for the 1975 contract, ALPA requested Ozark to sever any ties between occupational injury pay under Section 15E of the contract and compensability of the injury under workers' compensation laws. When Ozark proposed the language of "When the Company determines that an employee has an occupational injury..." which resolved the need for waiting for a state agency to determine and thereby expedited the processing of claims, it would have been easy for ALPA to counter with a proposal to the effect that "When the Company determines on some basis other than compensability under workers' compensation laws that an employee has an occupational injury...". However, ALPA did not do so. Instead it accepted the language as proposed by Ozark which the arbitrator admits on its face granted Ozark the right to make the determination without restriction on the, "...specific standard or criticism in making such determination". If this case had been before the Second Circuit, the award would have been vacated based on its Torrington decision. However, in the Eighth Circuit, the result was just the opposite.

In order to resolve this conflict between the Second and Eighth Circuits on whether an arbitration decision derives its essence from the contract under circumstances where the arbitrator granted the Union in arbitration a benefit it was unsuccessful in obtaining through negotiations, the Court should grant Ozark's petition in this case.

CONCLUSION

By the equally divided en banc decisions in the present case and the Riceland case and the five to four decision in the Litton case, the Eighth Circuit has so substantially deviated from the principles governing judicial review of labor arbitration awards as to effectively eliminate any judicial review over such awards. In order to preserve the integrity of the arbitral process and maintain uniform standards for judicial review of arbitration awards, this Court should grant Ozark's petition for a writ of certiorari.

A conflict exists between the decision of the Eighth Circuit in the present case enforcing an arbitration award where the arbitrator granted the union a benefit it was unable to obtain in negotiations and the Torrington decision of the Second Circuit denying enforcement of such an award. Therefore, this Court should grant Ozark's petition for a writ of certiorari in order to maintain uniformity between the Circuits in the application of the principles governing judicial review of arbitration awards.

Respectfully submitted,

Robert B. Vining, Jr.*
Donald J. Meyer
VINING & MEYER, P.C.
7751 Carondelet Avenue, Suite 606
Clayton, Missouri 63105
(314) 726-3315
Attorneys for Petitioner

*Counsel of Record

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1055

Ozark Air Lines, Inc.,
Appellant,

v.

The Air Line Pilots
Association, International,
Appellee.

Appeal from the United
States District Court for
the Eastern District of
Missouri.

Submitted: April 29, 1985

Filed: May 21, 1985

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, HEANEY, BRIGHT, ROSS, McMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, and BOWMAN, Circuit Judges, En Banc.

ORDER

On rehearing en banc, the judgment of the district court, upholding the arbitrator's opinion, is affirmed by an equally divided vote.[1] Chief Judge Lay and Circuit Judges Floyd R. Gibson, Heaney, Bright, and Arnold vote to affirm. Circuit Judges Ross, McMillian, John R. Gibson, Fagg, and Bowman vote to reverse.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

[1] The grant of the rehearing en banc serves to vacate the prior panel opinion published at 744 F.2d 1347 (1984).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 84-1055

Appeal from the United States District Court for the Eastern District of Missouri.

Ozark Air Lines, Inc.,
Appellant,

v.

The Air Line Pilots Association, International,
Appellee.

Submitted: June 13, 1984

Filed: October 1, 1984

Before BRIGHT, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and McMILLIAN, Circuit Judge.

BRIGHT, Circuit Judge.

This case arises from a dispute between the parties as to whether the absence from work of two injured pilots should be characterized as "occupational sick leave" or as "regular sick leave" under the governing labor agreement. The system board

of adjustment, to which the dispute was referred, agreed with the Pilots Association that the absences qualified as occupational sick leave. The district court,[1] on the parties' cross-motions for summary judgment, upheld the board's decision. Ozark appeals. We affirm.

I. BACKGROUND.

Under the labor agreement between Ozark and the Pilots Association, each pilot accrued both occupational sick leave credit and regular sick leave credit. When a pilot missed work because of injury or illness, he was entitled to collect pay for the time missed, deductible against one or both of his accrued sick leave credit accounts. Absences attributable to "occupational injury" were deductible against accrued occupational sick leave time, until the account was exhausted, and then against accrued regular sick leave time. Absences other than those attributable to "occupational injury," however, were deductible only against accrued regular sick leave time.[2] The labor agreement did not define "occupational injury." It provided only that, "[w]hen the Company [*i.e.,* Ozark] determines that an employee has an occupational injury, such employee shall be eligible for occupational injury pay."

This case arose after two pilots filed for occupational sick leave pay, claiming to have suffered back injuries while on the job. Ozark paid them sick leave, but charged their absences against their accrued regular sick leave time rather than against

---

[1] The Honorable Roy W. Harper, United States Senior District Judge for the Eastern District of Missouri.

[2] Though the rate of sick leave pay is the same whether the absence is characterized as regular or as occupational, the pilots would apparently prefer to have the absences charged against occupational leave, in order to conserve their regular leave time to apply against future nonoccupational absences.

their accrued occupational sick leave time, on the ground that, though the injuries had occurred on the job, they were not "accidental" and thus would not be compensable under the workers' compensation law of the pilots' home state, Missouri. In response to Ozark's action, the Pilots Association initiated grievance proceedings. The dispute was eventually referred for arbitration to the system board of adjustment, pursuant to the terms of the labor agreement.

The agreement provided for a four-member board, consisting of two representatives of Ozark and two representatives of the Pilots Association. The board's decisions were to be final and binding on all parties. The agreement provided that, in case of a deadlock among the four-member board, either Ozark or the Pilots Association could petition the National Mediation Board to appoint a neutral referee to serve as the fifth member of the board to resolve the deadlock.

When the grievances in this case were initially submitted to the four-member board, Ozark argued that the board lacked jurisdiction to decide the controversy. Ozark contended that the labor agreement gave Ozark unreviewable discretion to determine whether a pilot's absence was attributable to "occupational injury." Ozark rested this claim on the single sentence in the agreement which provided that occupational leave pay was available "[w]hen the Company determines that an employee has an occupational injury." The Pilots Association argued that the board of adjustment did have jurisdiction over the grievances. It pointed to language in the labor agreement which gave the board power to decide all disputes "growing out of grievances or out of interpretation or application of any of the terms of the * * * Agreement." The Pilots Association contended that the meaning of "occupational injury" and the extent of Ozark's discretion under the agreement were questions of interpretation of the terms of the agreement, and were therefore subject to arbitration by the board.

The four-member board deadlocked on the arbitrability issue. The Pilots Association then petitioned for appointment of a neutral referee to serve as the tiebreaking fifth member. The referee sided with the Pilots Association's representatives, holding that the grievances were arbitrable. Ozark does not contest this decision.

Ozark then moved that the five-member board, having resolved the threshold arbitrability issue, remand the merits of the grievances to the four-member board for resolution. The five-member board held, however, on a 3 to 2 vote, that it had jurisdiction over the merits and need not remand the grievances to the four-member board. It then decided the merits of both grievances in favor of the pilots, again by a vote of 3 to 2.

On appeal, Ozark raises two issues. First, it contends that the five-member board had jurisdiction only over the arbitrability issue, not over the merits of the grievances, and should therefore have remanded the merits to the four-member board for decision. Second, Ozark argues that even if the five-member board had jurisdiction over the merits, its decision on the merits does not draw its essence from the labor agreement and therefore should not be enforced.

II. DISCUSSION.

A. Scope of Judicial Review.

A court reviewing the decision of an airline system board of adjustment may set the decision aside on any of three grounds: (1) failure of the board to comply with the provisions of the Railway Labor Act, 45 U.S.C. §§ 151-188, (2) failure of the board to confine itself to matters within its jurisdiction, and (3) fraud or corruption of a member of the board. 45 U.S.C. §§ 184, 153 First (q). *See Loveless v. Eastern Air Lines,* 681 F.2d 1272, 1275-78 (11th Cir. 1982); *Hunt v. Northwest Airlines,* 600 F.2d 176, 177-79 (8th Cir.), *cert. denied,* 444 U.S. 946 (1979).

Where, as here, the party seeking to have the board's order set aside contends that the board acted beyond its jurisdiction, the reviewing court's role is limited solely to determining whether the board exceeded its jurisdiction. Once the court determines that the board acted within the scope of its authority—that is, that the board conformed to the limits on its authority set forth in the labor agreement, and that the award draws its essence from the agreement—the court's task is finished. A court will not set aside an award rendered within the scope of the board's jurisdiction, either for ordinary error or because the court would itself have reached a different resolution of the merits had the parties submitted the merits for judicial determination in the first instance. *Zeviar v. Local 2747, Airline, Aerospace and Allied Employees,* 733 F.2d 556, 559 (8th Cir. 1984); *Loveless v. Eastern Air Lines, supra,* 681 F.2d at 1275-76. *Cf. Daniel Construction Co. v. Int'l Union of Operating Engineers,* No. 83-2221, slip op. at 5-6 (8th Cir. June 29, 1984) (applying same standard to review of an arbitrator's decision under section 301 of the Labor Management Relations Act). Moreover, when disagreement arises between the parties whether a particular dispute is arbitrable under the terms of the governing labor agreement, courts will broadly construe the agreement in favor of arbitrability, resolving doubts on the side of the board's authority. *United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960); *Zeviar v. Local 2747, supra,* 733 F.2d at 559; *Lackawanna Leather v. United Food & Commercial Workers,* 706 F.2d 228, 230-31 (8th Cir. 1983) (en banc).

B. Jurisdiction Of The Five-Member Board To Decide The Grievances On Their Merits.

Both of the board rulings that Ozark challenges are matters of interpretation of terms of the labor agreement. The first issue—whether the five-member board had jurisdiction over the merits of the grievances, or only over the threshold question of arbitrability—turns on the interpretation of the following language in the agreement:

> When a deadlock occurs in a case referred to the Board, it shall be the duty of the Board to endeavor to reach a decision, and failing in this, to agree, within thirty (30) days of the date of such deadlock, upon a procedure for breaking the deadlock. The said procedure for breaking the deadlock shall, when found necessary as a final step to settle a deadlocked case, include the appointment of a neutral person to be known as a referree to sit with the Board as a member thereof and make the award. In any case where the said System Board of Adjustment becomes deadlocked and unable to reach a decision upon a method for breaking the deadlock or unable to mutually agree upon the appointment of a referee within the above prescribed thirty (30) days, either the Company or the Association may within thirty (30) days thereafter petition the National Mediation Board for the appointment of a neutral referee to sit with the System Board of Adjustment as a member thereof. In case neither party shall so petition the National Mediation Board within the above prescribed thirty (30) day period, the matter in question shall be deemed by all parties concerned to be ended and no action thereon shall be taken thereafter by either party. Such Board of Adjustment, as then constituted, shall hear the parties with reference to the dispute pending before it, and a majority vote of the Board shall be final, binding and conclusive between the Company and the Association and anyone they may represent having an interest in the dispute.

The Pilots Association argued before the five-member board that this language meant that, once the four-member board had deadlocked on any aspect of a pending case, a fifth member was to be appointed to sit with the board to resolve the whole dispute, not merely the narrow question on which the four members initially deadlocked. Ozark, however, argued that, where the four members deadlocked on a single issue within a case, the fifth member sat only to resolve that single issue, and

not to participate in the board's deliberations on any other aspect of the case.

The five-member board acknowledged the plausibility of Ozark's interpretation of the provision in question. Nevertheless, the board concluded that it had jurisdiction over the whole pending grievance. Ozark now asks this court to set the board's ruling aside on the ground that it does not draw its essence from the contract.

We agree with the board that the disputed provision is fairly susceptible of either of the two conflicting interpretations offered by the parties. The interpretation adopted by the board is, however, at least as well grounded in the language of the agreement as is the interpretation Ozark urges.

In particular, the agreement provides that, "[w]hen a deadlock occurs *in a case,*" a neutral referee may be appointed "to sit with the Board as a member thereof *and make the award*" (emphasis added). "Making the award" in a "case" in which a deadlock has occurred seems naturally to refer to rendering the final, dispositive judgment between the parties in the proceeding, rather than merely to deciding some issue or question preliminary to a consideration of the merits. The agreement further provides that, upon the appointment of the neutral fifth member, the board of adjustment, "as then constituted, shall hear the parties with reference to *the dispute pending before it*" (emphasis added). The meaning of "the dispute pending before it" is unclear; the phrase could refer either to the whole controversy before the board, or to that narrower part of the controversy which gave rise to the specific deadlock that the referee was initially summoned to resolve. In any event, the interpretation on which the board settled is at least fully consistent with the language in question. The language of the agreement certainly lends no stronger support to Ozark's interpretation than to that adopted by the board.

The board, then, did nothing more than give admittely ambiguous language a construction at least as plausible as any other suggested. We have no basis for saying that the board ruling fails to draw its essence from the contract. Therefore we cannot set the board's ruling aside.[3]

C. The Meaning Of "Occupational Injury."

After the board of adjustment determined that the grievances were arbitrable and that the neutral referee could participate in the proceedings on the merits, it undertook to decide whether Ozark had properly denied the two injured pilots occupational sick leave pay.

Ozark argued that, given the lack of any definition of "occupational injury" in the labor agreement, it was free to follow its longstanding practice of paying occupational sick leave pay only to pilots whose injuries were compensable under the workers' compensation laws of the state of their domicile. For the pending grievances, Ozark contended, the appropriate standard was Missouri workers' compensation law, under which benefits were available only for "accidental" injuries sustained on the job.[4] In any event, Ozark argued, the labor agreement clearly left it up to Ozark to determine whether an occupational injury had occurred; the board of adjustment was bound to give the words, "[w]hen the Company determines that an employee has an occupational injury" their plain meaning and to defer to Ozark's characterization of the injuries as nonoccupational.

---

[3] Ozark does not contend that the five-member board had no authority to resolve the dispute over whether the merits should be heard by the five-member or the four-member board. Both parties argued their positions on the construction of the disputed language to the five-member board, an implicit concession that they believed the board as so constituted to be the proper body to decide the question.

[4] The parties do not dispute that the grievant pilots did not suffer such "accidental" injuries.

The Pilots Association argued, however, that the bargaining history behind the labor agreement showed the contested language to have a different meaning. According to the Association, "occupational injury" meant any injury sustained on the job, whether or not compensable under state workers' compensation laws. In the Association's view, the airline's role was limited to determining whether an injury had occurred on the job. If the airline so found, the pilot was entitled to occupational sick leave pay.

The board of adjustment reviewed the bargaining history and previous labor agreements between the parties. It found that, prior to 1975, Ozark paid occupational sick leave pay to an injured pilot only after a state workers' compensation board had determined that the pilot had suffered a compensable injury. In contract negotiations in 1975, however, the Pilots Association sought to have eligibility for occupational leave determined on a basis other than compensability under state workers' compensation law.

The language at issue in this case ("[w]hen the Company determines that an employee has an occupational injury," etc.) was adopted during the 1975 negotiations. With the adoption of the new language, Ozark no longer waited until a state workers' compensation board had determined an employee to have suffered a compensable injury before paying occupational leave pay. Instead, Ozark made the "occupational injury" determination itself, still, apparently, using state law compensability as the standard, though nowhere in the contract is "occupational injury" defined in terms of state law compensability.

The board of adjustment concluded that the Pilots Association, at the close of the 1975 negotiations, believed that the new language completely divorced "occupational injury" from compensability under state workers' compensation law. Because Ozark drafted the language in question, the board held that any ambiguities in the language which had given rise to misunderstanding on the Pilots Association's part should be

construed against Ozark. Accordingly, the board adopted the Pilots Association's interpretation of the disputed language. Under that interpretation, the injured pilots were entitled to occupational sick leave pay.

Ozark's principal contention on appeal is that the board's ruling fails to draw its essence from the contract, to the extent that it rests not on the language of the contract but on the bargaining history and on the rule of interpretation that ambiguous language is to be construed against its drafter. According to Ozark, there is nothing ambiguous about the language, "[w]hen the Company determines that an employee has an occupational injury, such employee shall be eligible for occupational injury pay." Therefore, Ozark contends, the board had no authority to look beyond the language of the agreement to the bargaining history underlying it.

We reject Ozark's position. It is settled that, in construing the terms of a labor agreement, the arbitrator "may * * * look for guidance from many sources." *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960). This court has upheld other arbitral decisions that look beyond the terms of the labor agreement to past agreements between the parties and to various collateral instruments. *See Rainbow Glass Co. v. Local Union No. 610,* 663 F.2d 814 (8th Cir. 1981); *UAW v. White Motor Corp.*, 505 F.2d 1193 (8th Cir. 1974), *cert. denied,* 421 U.S. 921 (1975). Resort to such extrinsic sources as bargaining history and past and collateral agreements is permissible even where the terms of the agreement are superficially clear, if the arbitrator discerns a latent ambiguity in any of the terms or if the language of the agreement does not appear fully to express the intent of the parties. *Loveless v. Eastern Air Lines, supra,* 681 F.2d at 1278-80; *Humble Oil & Refining Co. v. Local 866, Int'l Brotherhood of Teamsters,* 447 F.2d 229, 232-33 (2d Cir. 1971). In such circumstances, an arbitral award does not fail to draw its essence from the contract merely because it is based in part on sources other than the contractual language itself.

In this case, we cannot say that the board's award fails to draw its essence from the labor agreement. The agreement nowhere defines "occupational injury." Neither is the language, "[w]hen the Company determines that an employee has an occupational injury," so clear and explicit a reservation of exclusive authority to Ozark as to preclude the board from looking to plainly relevant extrinsic sources to discern what the parties meant by the language.[5] Confronted by a dispute between the parties over the meaning of the provision, the board had the authority to look beyond the language of the agreement to determine the meaning of the terms in question.

The board adopted the Pilots Association's view that the labor agreement limited Ozark to making the factual determination whether a pilot's injury had occurred on the job. This interpretation is not inconsistent with the agreement language,

---

[5] This case thus stands in sharp distinction from *St. Louis Theatrical Co. v. St. Louis Theatrical Brotherhood,* 715 F.2d 405 (8th Cir. 1983). There, the contract absolutely prohibited work stoppages, and expressly provided that, except as to the fact of an employee's participation in such stoppages, there was to be no arbitration of alleged violations of the no-work-stoppage clause. We set aside the arbitrator's award reducing the discipline imposed against an employee whom the arbitrator found to have engaged in a work stoppage, on the ground that the award violated the express limitation on the scope of arbitration.

In the case now before us, the disputed language ("[w]hen the Company determines that an employee has an occupational injury," *etc.*) does not constitute a clear, express limitation on the board's arbitral authority. Rather, the extent to which it limits the board is itself a matter of interpretation, respecting which we defer to the board, resolving doubts in favor of board authority. *See United Steelworkers v. Warrior & Gulf Navigation Co., supra,* 363 U.S. at 582-83; *Zeviar v. Local 2747, supra,* 733 F.2d at 559. To fail to give full play to the arbitration clause of the agreement, absent a clear and definite indication that the parties intended to limit the scope of arbitration on this issue, would do violence both to the labor agreement and to the Railway Labor Act's policy favoring the arbitration of contract disputes.

which taken alone gives no indication as to what the parties meant by "occupational injury." Ozark's argument that the agreement gave it complete freedom to define "occupational injury" as it chooses, would, if carried to its logical end, entitle the airline to deny occupational sick leave pay to every claimant, no matter how meritorious his claim, on any ground whatsoever. Though Ozark has never administered the sick leave program in such an arbitrary or restrictive manner, the board was plainly entitled to reject, as likely not reflecting the intent of the parties, an interpretation of the contract language which would empower Ozark to act so arbitrarily as to render the whole occupational sick leave program ineffective. Having concluded that the agreement did not give the airline unfettered discretion to define "occupational injury" as it pleased, the board merely settled on one reasonable definition of the term rather than another. In determining that the agreement entitled pilots to occupational sick leave pay for any injury sustained on the job, rather than only for injuries compensable under state workers' compensation law, the board simply inferred from the bargaining history, with the help of a familiar rule of construction, a definitional standard for "occupational injury," a term not defined in the agreement itself. We cannot characterize such an inference as improper or as beyond the authority of the board to make.

This court's role extends no further than ascertaining, as we have, that the board rationally resorted to relevant extrinsic evidence and to settled rules of interpretation in construing the labor agreement, and that nothing in the agreement prohibited it from doing so. As long as the board stayed within the scope of its authority, we do not sit to review the substance of its decision. Accordingly, we decline to set the board's award aside.

III. CONCLUSION.

The decision of the district court is affirmed. The Pilots Association's motion for fees and double costs on grounds of frivolousness is denied.

MCMILLIAN, Circuit Judge, dissenting.

I agree that where the terms of the collective bargaining agreement are superficially clear and facially unambiguous, the arbitrator may look for guidance outside the terms of the agreement to extrinsic or collateral sources, if there is a latent ambiguity. *See Rainbow Glass Co. v. Local Union No. 610, International Brotherhood of Teamsters,* 663 F.2d 814, 817 (8th Cir. 1981); *accord Loveless v. Eastern Air Lines, Inc.*, 681 F.2d 1272, 1280 (11th Cir. 1982) (excellent discussion).

My disagreement with the majority lies in the application of this rule to the language at issue in this case. I do not agree that the language at issue is only superficially clear and facially unambiguous or contains any latent ambiguity. The language at issue expressly states that whether an employee has an occupational injury will be determined by the company, thus clearly reserving to the company the tasks of determining what constitutes an occupational injury and whether a particular employee has an occupational injury. Because the language at issue is plain and unambiguous, the board should not have considered extrinsic or collateral materials. The board's award is inconsistent with the language at issue and therefore cannot be said to draw its essence from the collective bargaining agreement. I would reverse the judgment of the district court.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1617C (A)

Ozark Air Lines, Inc.,
Plaintiff,

vs.

Air Line Pilots Association, International,
Defendant.

ORDER

(Filed December 8, 1983)

In accordance with the Memorandum of the Court this day filed which is incorporated in and made a part of this order;

IT IS HEREBY ORDERED and ADJUDGED that the motion of defendant, Air Lines Pilots' Association, International, for summary judgment be and it is hereby sustained.

IT IS FURTHER ORDERED that the motion of plaintiff, Ozark Air Lines, for summary judgment is denied.

It is FURTHER ORDERED that the plaintiff, Ozark Air Lines comply with the grievance awards entered by its systems board of adjustment in Grievance Nos. STL-78-7-1 (L. Behnken) and STL-81-4-1 (T. Gerber).

EYVON MENDENHALL, Clerk

By /s/ Lisa Lang
Deputy Clerk

Dated at St. Louis, Missouri,
this 8th day of December, 1983.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 83-1617C (A)

Ozark Air Lines, Inc.,
Plaintiff,

vs.

Air Line Pilots Association, International,
Defendant.

MEMORANDUM AND ORDER

(Filed December 8, 1983)

This matter is before the Court on the cross-motions for summary judgment of plaintiff and defendant, respectively.

Plaintiff, Ozark Air Lines, Inc., (hereinafter referred to as Ozark), is an air carrier operating in interstate commerce, as defined in the Railway Labor Act. Sec. 45 USC 181. Ozark filed a complaint asking this Court to vacate an award entered by a neutral referee sitting on the airline's systems board of adjustment. Ozark's board is a system adjustment board created by the parties to the collective bargaining agreement, as required by 45 USC 184. The defendant, Air Line Pilots Association International (hereinafter referred to as ALPA), answered plaintiff's complaint with a counterclaim for enforcement of the award.

This Court has jurisdiction over this matter under the Railway Labor Act, 45 USC 151-188. See *I.A.M. v. Central Airlines, Inc.*, 372 U.S. 682, 685 (1963).

The facts leading up to this dispute are without controversy. In 1978 and 1981, ALPA filed grievances on behalf of two pilots, maintaining that Ozark had violated their collective

bargaining agreement with ALPA by compensating the pilots for time lost due to injury as regular sick leave, rather than as occupational injury leave. The grievances were denied by Ozark's vice-president for operations, who maintained that Ozark had sole discretion under the agreement to determine when a pilot was due occupational injury leave. The basis for the denial is found in Section 15E of the agreement, which provides: "When the company determines that an employee has an occupational injury, such employee shall be eligible for occupational injury pay." Nowhere in the agreement is occupational injury defined, nor is there any standard for Ozark to follow in determining what is an occupational injury.

ALPA then followed the procedures of the agreement and appealed the grievances to the systems board of adjustment, as provided for in Sections 26B and 27. The systems board consists of two members representing Ozark and two from ALPA, with provisions for adding a fifth neutral member if the board becomes deadlocked on any dispute pending before it.

The merits of the grievances were never presented to the board, since they deadlocked on the issue of whether the board had jurisdiction to hear the merits of the occupational injury claims. Ozark contends that the board had no jurisdiction because the unambiguous language of Section 15E — "When the company determines * * *" — is not open for interpretation, and that a decision by the board on this matter would exceed its jurisdiction under Section 28E of the agreement. The language cited by Ozark in that section states: "The jurisdiction of the board shall not extend to proposed changes in hours of employment, rates of compensation or working conditions covered by existing agreements between the parties hereto." In essence, Ozark argues that allowing the board to hear the claims on the merits will effectively change Section 15E to read, "When the systems board determines* * *," and such change would exceed its jurisdiction.

ALPA contends that other language in Section 28E gives the board jurisdiction to interpret and apply any terms of the agreement. That language provides: "The Board shall have jurisdiction over disputes between any employee covered by the Pilots' Agreement and the Company growing out of grievances or out of interpretation or application of any of the terms of the Pilots' agreement." ALPA argues that they seek an interpretation of what is an "occupational injury" instead of seeking a change in the contractual language.

ALPA, applying the grievances provisions, sought a neutral referee from the National Mediation Board to sit on the board and resolve the deadlocked dispute. The referee decided in favor of ALPA, finding that the systems board had jurisdiction over the merits of the grievances, and that the five-man board (which includes the referee) also had jurisdiction to decide the dispute on its merits. Ozark objected to this last action, maintaining that the neutral referee had accomplished his purpose, and that the merits of the claims should be remanded back to the four-man board (without the referee). Nevertheless, the neutral referee held that remanding the grievances back to the four-man board would serve no legitimate purpose except to further delay their final resolution. The grievances were presented on the merits and an award was given in favor of the two pilots. Ozark seeks the vacation of both awards by the board and ALPA seeks to enforce those awards.

Both parties have filed motions for summary judgment. The law is well established that for this Court to grant summary judgment, there must be no genuine issue of any material fact, and that the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure. Summary judgment is appropriate for this action, as only legal issues, and no factual questions, are before this Court for decision.

A court may overturn the decision of an airline systems adjustment board only on the basis of one of the grounds listed in

45 USC 153 (First q). See *Singer v. Flying Tiger Line, Inc.*, 652 F.2d 1249, 1355-56 (9th Cir. 1981); *Northwest Airlines, Inc. v. Air Line Pilots Association, International*, 530 F.2d 1048, 1050 & n. 9 (D.C. Cir.), *cert. denied*, 426 U.S. 942 (1976); *Hunt v. Northwest Airlines*, 600 F.2d 176, 178 (8th Cir. 1979). 45 USC 153 (First q) provides that an arbitral award may be vacated for failure "to conform, or confine itself, to matters within the scope of the divisions' jurisdiction, or for fraud or corruption by a member * * *." It has been held that the substantive grounds for vacatng labor awards that do not exist are extremely narrow. *Lovelace v. Eatern Air Lines, Inc.*, 681 F.2d 1272, 1276 (1th Cir. 1982). *Loveless* involved an airline arbitration panel's award denying supplemental retirmenet befefits to former employees. The court there discovered three interrelated grounds, as exposited by the courts, for substantive review of arbitral awards. The three grounds and authority to each listed by the court were:

> "(1) Whether the award is irrational, see, e.g., *Gunther v. San Diego & Arizona E. Ry.*, 382 U.S. 257, 261 **** (1965) ('wholly baseless and completely without reason'); *Safeway Stores v. American Bakery Workers, Local 111*, 390 F.2d at 82 [5th Cir. 1968] ('if * * * no judge, or group of judges could ever conceivably have made such a ruling'); S. Rep. No. 1201, *supra* at 3, reprinted in 1966 U.S. Code Cong. & Ad. News, at 2287 ('actually and indisputably without foundation in reason or fact');
>
> "(2) Whether the award draws its essence from the letter or purpose of the collective bargaining agreement, *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U. S. at 597; see *Brotherhood of Railroad Trainmen v. Central of Georgia Ry.* * * *, 415 F.2d at 412 [5th Cir. 1969] (arbitrator's award 'must have a basis that is at least rationally inferable, if not obviously drawn, from the letter of purpose of the collective bargaining agreement'), and

"(3) Whether the arbitrator conformed to a specific contractual limitation upon his authority, see e.g. *Magnavox Co. v. International Union of Electrical Workers,* 410 F.2d 388, 389 (6th Cir. 1969); *Torrington Co. v. Metal Products Workers Union Local 1645,* 362 F.2d 677, 680 (2nd Cir. 1966); *Textile Workers Union v. American Thread Co.,* 291 F.2d 894, 899-900 (4th Cir. 1961)."

Two questions resulting from the referee's award are before this Court to be decided within the parameters of review set out above. First, was the referee's decision that the board has jurisdiction over the occupational injury claim irrational and in violation of the language of the collective bargaining agreement? Second, did the neutral referee exceed the board's jurisdiction by entertaining the grievances on the merits rather than remand the merits to the board sitting without him? These issues will be discussed separately below.

Section 204 of the Railway Labor Act, 45 USC 184, mandates that carriers and organizations establish boards of adjustment to resolve all disputes concerning rates of pay, rules or working conditions. As the referee noted, the Act imposes a duty upon both carriers and organizations to create a machinery in their collective bargaining agreements for the arbitration of such minor disputes. *I.A.M. v. Central Airlines, Inc.,* supra at 686. Section 28 of the collective bargaining agreement is the culmination of this duty imposed on Ozark and ALPA. That section gives jurisdiction to the board "over disputes * * * growing out of grievances or out of interpretation or application of any of the terms of the Pilots' Agreement." The agreement is silent as to any standards by which Ozark is to determine whether an occupational injury has occurred. It is not irrational for the referee to decide that the Board's help is needed to resolve the ambiguity of what exactly an "occupational injury" is under the agreement. As such, the referee's decisions can be said to be rationally drawn from the essence of the collective bargaining agreement. Therefore, under the standards of review set out

above, this Court concludes that the referee's award of jurisdiction to the board should be upheld.

The second question, that of whether the referee should have remanded the merits of the grievances back to the four-man board, also involves an interpretation of the agreement. Section 28M provides in part:

> "In any case where the said System Board of Adjustment becomes deadlocked and unable to reach a decision upon a method for breaking the deadlock or unable to mutually agree upon the appointment of a referee within the above prescribed thirty (30) days, either the company or association may within thirty (30) days thereafter petition the National Mediation Board for the appointment of a neutral referee to sit with the System Board of Adjustment as a member thereof."

ALPA requested a referee from the National Mediation Board to resolve the deadlock. In its request, the attorney for ALPA wrote:

> "The Association moved to hear the cases on the merits and the Company moved to dismiss the cases. As a result, the System Board has deadlocked on the motions. Therefore, pursuant to Paragraph M of the Ozark Air Lines Pilots' System Board of Adjustment Agreement, the Association hereby petitions the National Mediation Board for appointment of a neutral referee to hear the cases. A single neutral referee is requested to hear both cases together since both involve the same jurisdictional issue and have been heard together by the System Board of Adjustment." (ALPA's letter to the National Mediation Board, dated August 4, 1981.)

It is clear that ALPA petitioned for a referee to hear the "cases" and not just the one jurisdictional issue. Ozark argues that a remand is required because the dispute before the board

was only the jurisdictional issue and no waiver of a hearing before the four-man board was mutually agreed upon by the parties. The agreement, however, contains no explicit mandate for a remand in this situation, and the restrictive interpretation advanced by Ozark can only be viewed as a tactic for delay in a situation calling for a speedy resolution.

Section 28M, the last sentence, commands that the board of adjustment, as then constituted (with referee), "shall hear the parties with reference to the dispute pending before it * * *." The dispute before it concerned whether the pilots were entitled to occupational injury pay. As the referee noted in the board's award of jurisdiction, "Implicit in the Carrier's position on this issue is that the language of Section 15E so clearly reserves to the Carrier the right to determine whether an employee has an occupation injury that it is not arguably subject to challenge. In essence, it is an argument as to the merits of the case."

This Court agrees with this reasoning by the referee. The referee held that because the four-man board is partisan in nature, there is little likelihood anything but a deadlock will result from further consideration of these grievances by the four-man board. Finding that the purpose of Section 28 is to provide a machinery for the speedy resolution of minor disputes, the referee decided to also hear the case on the merits. This Court finds that the referee was well within the jurisdiction given to the board in also deciding the merits of the grievances.

Finally, this Court recognizes that the referee's decisions here may not have been the same as a judge using ordinary principles of contract construction. The narrow standard of review of arbitral awards elicited above, however, renders that fact totally irrelevant. *Loveless v. Eastern Air Lines,* supra, at 1280; *Safeway Stores v. American Bakery Workers, Local 111,* 390 F.2d at 83-84. What is relevant is that the system board reached a result that, in this Court's view, comported with the essence of the collective bargaining agreement. Accordingly, it is the duty

of this Court to affirm the award of the board and render an order directing its enforcement.

For the reasons stated above, the motion of the defendant, Air Line Pilots' Association, International, for summary judgment is sustained. The motion of plaintiff, Ozark Air Lines, for summary judgment is denied. Ozark is hereby ordered to comply with the grievance awards entered by its systems board of adjustment in Grievance Nos. STL-78-7-1 (L. Behnken) and STL-81-4-1 (T. Gerber).

In accordance with this memorandum opinion, it is hereby ordered and adjudged that the motion of defendant, Air Lines Pilots' Association, International, for summary judgment be and it is hereby sustained, and the clerk of the Court will prepare and enter the proper order to that effect.

/s/ Roy W. Harper
U. S. District Judge

APPENDIX E

AGREEMENT

between

OZARK AIR LINES, INC.

and

THE AIR LINE PILOTS

in the service of

OZARK AIR LINES, INC.

as represented by

THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL

THIS AGREEMENT is made and entered into in accordance with the provisions of the Railway Labor Act, as amended, by and between OZARK AIR LINES, INC., (hereinafter known as the "Company") and the Air Line Pilots in the service of OZARK AIR LINES, INC., as represented by THE AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, (hereinafter known as the "Association").

In making this Agreement, the parties hereto recognize that compliance with the terms of the Agreement and the development of a spirit of cooperation is essential for mutual benefit and for the intent and purpose of this Agreement.

It is hereby mutually agreed:

SICK LEAVE

SECTION 15

E. Pilots shall accrue five (5) hours occupational sick leave credit for each month of employment as a pilot with the Company until four hundred fifty (450) hours have been accrued.

When the Company determines that an employee has an occupational injury, such employee shall be eligible for occupational injury pay. Pay and credit for such occupational leave shall be computed on the same basis as sick leave pay and charges against occupational leave credit shall be made on the same basis as charges against sick leave credit. Occupational leave shall be used prior to sick leave. However, an employee shall not be permitted to use any of his occupational leave credit for sick leave.

In the event of occupational injury, the affected pilot agrees that the Company may deduct from his pay an amount equal to the weekly Workmen's Compensation benefits received by him under applicable law during the period covered by his sick leave pay.

APPENDIX F

OZARK AIR LINES PILOTS
SYSTEM BOARD OF ADJUSTMENT

In the Matter of Arbitration

Between

OZARK AIR LINES, INC.

And

THE AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL

AWARD

Grievance Nos. STL-78-7-1
(L. Behnken)

STL-81-4-1
(T. Gerber)

BACKGROUND:

Grievants in this case are covered in their employment as pilots of Ozark Air Lines, Inc. (Carrier) by a collective bargaining agreement between Carrier and the Air Line Pilots Association, International (Organization). On July 17, 1978, the Organization filed Grievance No. STL-78-7-1 on behalf of L. Behnken alleging violation by the Carrier of Sections 3, 15 and related sections of the agreement, and on April 15, 1981, the Organization filed Grievance No. 81-4-1 on behalf of T. Gerber alleging a violation of Section 15 and related sections of the agreement for denying occupational sick leave.

Both grievances were progressed to R. Grant Rees, Vice President of Operations for the Carrier who, after hearing each grievance, found with respect to each that "[A]fter considering the facts in this case, I feel that I have no recourse but to deny

this grievance." Both grievances were appealed to this Board pursuant to Section 28 of the agreement.

The grievances were twice placed on the agenda of the four-man Board. Each time the Organization sought to present the cases on their merits and was prepared with witnesses to move forward with the case. However, on each occasion the Carrier contested the Board's jurisdiction. At the second hearing on July 24, 1981, the Organization moved that the grievances be heard by the Board on their merits, and the Carrier moved that the grievances be dismissed. By decision of July 29, 1981, the Board deadlocked on both motions. Pursuant to Section 28M of the agreement the National Mediation Board appointed a Neutral Referee to sit with this Board as a member thereof.

The Carrier pursued its jurisdictional arguments before the five-man Board and argued, alternatively, that should the Board determine jurisdiction existed to resolve the grievances on their merits, the grievances should be remanded to the four-man Board. However, the five-man Board determined that the Board had jurisdiction to decide the grievances on their merits and that the five-man Board rather than the four-man Board should render that decision.

The grievances are now before this five-man Board for determination on their merits.

ISSUE:

Did the Carrier violate the agreement when it refused to grant grievants occupational injury pay as provided in Section 15E of the agreement?

FINDINGS:

The Board, upon the whole record and all the evidence, finds that grievants are "employees" and Ozark Air Lines, Inc. is a Carrier within the meaning of the Railway Labor Act, as

amended, 45 U.S.C. §§151, *et seq*. All parties to this dispute were given due notice of the hearing.

Before addressing the merits of the grievances the Board feels compelled to rule upon the Carrier's renewed motion to dismiss these grievances on jurisdictional grounds or, alternatively, to remand the grievances to the four-man Board for a decision on their merits. By its motion the Carrier seeks the same relief denied by this Board in its prior determination rejecting the same contentions by the Carrier. This Board has been shown no new evidence or argument in the instant proceeding which would support the Carrier's renewed motion. On the contrary, the Board believes the record in the instant proceeding confirms the correctness of its previous determinations. Accordingly the Carrier's renewed motion is denied.

Turning to the merits of the grievances, the material facts are relatively uncomplicated. While piloting a FH227 aircraft Captain Behnken experienced back pain shortly after manipulating the "gust lock." The condition was diagnosed by a physician as a ruptured disk. Captain Behnken underwent treatment, including a surgical procedure, and he returned to work in approximately four months.

Captain Gerber experienced back pain after completing a "maximum performance aborted takeoff" maneuver in the Carrier's flight simulator. Captain Gerber consulted a physician who diagnosed his condition as a lumbosacral sprain which left Captain Gerber with a permanent partial disability. However, after a period of treatment Captain Gerber returned to his duties after missing a total of 107:40 flight hours. Several months later Captain Gerber suffered a recurrence of the injury which resulted in a loss of 27:17 flight hours.

Upon reporting their injuries to the Carrier, both pilots were instructed to complete forms and file for Workmen's Compensation. Both did so although there has been no adjudication of their Workmen's Compensation claims. Both also filed for oc-

cupational injury pay under Section 15E of the agreement. The Carrier initially granted the claims for occupational injury pay, but later the Carrier reversed its decision in each case and treated the pilots' time out of service as sick leave under other provisions of Section 15. The latter action generated the grievances in this case.

The merits of the grievances before this Board are governed by Section 15 of the agreement which controls the accrual and compensation of sick leave. Paragraph E of Section 15, which provides for accrual and compensation of occupational sick leave separately from regular sick leave, reads:

> Pilots shall accrue five (5) hours occupational sick leave credit for each month of employment as a pilot with the Company until three hundred sixty (360) hours have been accrued.
>
> When the Company determines that an employee has an occupational injury, such employee shall be eligible for occupational injury pay. Pay and credit for such occupational leave shall be computed on the same basis as sick leave pay and charges against occupational leave credit shall be made on the same basis as charges against sick leave credit. Occupational leave shall be used prior to sick leave. However, an employee shall not be permitted to use any of his occupational leave credit for sick leave.
>
> In the event of occupational injury, the affected pilot agrees that the Company may deduct from his pay an amount equal to the weekly Workmen's Compensation benefits received by him under applicable law during the period covered by his sick leave pay.

In determining whether a pilot has suffered an occupational injury within the meaning of Section 15E, the Carrier looks to state Workmen's Compensation law. If the Carrier determines that the injury is compensable thereunder, the Carrier grants oc-

cupational injury pay for working time missed due to the injury. If not, the time missed due to the injury is compensated as sick leave under other provisions of Section 15. Officials in the Flight Operations Department actually determine whether an injury shall be compensated under Section 15E as occupational sick leave or as regular sick leave pursuant to the other provisions of Section 15. However, in so doing those officials follow the advice of the Carrier's Workmen's Compensation Coordinator as to whether the particular injury is compensable under applicable state Workmen's Compensation law. The Coordinator bases his advice upon the report of an insurance adjusting company.

At the hearing before this Board the Coordinator testified that in his opinion neither of the injuries suffered by Grievants, both of whom were domiciled and based in Missouri, was compensable under the Missouri Workmen's Compensation law. According to the Coordinator, that law does not provide compensation for the type of injuries suffered by Grievants because those injuries were not the result of an accidental occurrence.

The Organization raises a number of arguments in support of the grievants, the most cogent of which focuses directly upon the meaning of Section 15E of the agreement. The Organization contends that under Section 15E the Carrier may not condition occupational injury pay upon compensability of an injury under applicable state Workmen's Compensation law. Citing bargaining history, the Organization contends that Section 15E was intended to separate occupational injury pay from state Workmen's Compensation law. The Organization urges that the language "[W]hen the Company determines that an employee has an occupational injury..." was intended to restrict the Carrier to the determination whether a pilot sustained an injury while on the job and if so to compensate the pilot with occupational injury pay for any time missed from work as a result of the injury.

The Carrier argues that the language of Section 15E, *i.e.*, "[W]hen the Company determines...", places no limitation upon the method by which the Carrier reaches the determination as to whether an employee has sustained an occupational injury. The Carrier contends this language is so clear and unambiguous that this Board must follow it without further inquiry and dismiss the grievances.

Noting the fact that the third paragraph of Section 15E has appeared in successive agreements between the parties since 1959, the Carrier urges that the terms "occupational injury" used in Section 15E means an injury compensable under applicable Workmen's Compensation law. The Carrier argues that the interrelationship of occupational injury and Workmen's Compensation law was preserved through each contract and into Section 15E as it appears in the agreement applicable to the grievances in this case. The Carrier points to a letter from ALPA Counsel to the Carrier stating that Captain Behnken's grievance would be held in abeyance until a determination of his Workmen's Compensation claim as evidence of such continuing interrelationship. The Carrier argues that the letter would not have been necessary if no interrelationship existed. The Carrier cites authority for the proposition that Workmen's Compensation law is an integral part of the employment contract and that under Missouri Workmen's Compensation law, which is applicable to both Grievants, only injuries resulting from accidental occurrences are compensable. The Carrier urges that its denial of occupational injury pay to Grievants in this case was consistent with applicable Workmen's Compensation law.

The Carrier acknowledges that during negotiations involving Section 15E the Organization sought both to expedite the resolution of occupational injury pay claims and to sever the connection between occupational injury pay and Workmen's Compensation. The Organization was successful in its first objective but not its second. The Carrier agreed to make the deter-

mination as to whether an employee had suffered an occupational injury rather than continue practice of requiring a determination by an authoritative body as to compensability under applicable Workmen's Compensation law. However, the Carrier never agreed to abandon compensability under applicable Workmen's Compensation law as the condition for eligibility for occupational injury pay. The Carrier urges that this Board cannot grant the Organization what it was unable to secure in negotiation.

The merits of the grievances before this Board turn upon the meaning of the language in the second paragraph of Section 15E, "[W]hen the Company determines that an employee has an occupational injury...." The task before this Board is to ascertain what the Carrier and the Organization intended by that language.

It is a fundamental rule of agreement interpretation that the plain meaning of contract language must be followed by the interpreter of that language. Clear and unambiguous language must be followed without resort to parol evidence in the form of oral or written statements which would alter or vary the terms of the language. The Carrier relies heavily upon this rule and the language under scrutiny here tends to supports the Carrier's argument. On its face the language vests in the Carrier the authority to determine when an employee has suffered an occupational injury without restricting the Carrier to a specific standard or criterion in making such determination.

However, the parol evidence rule may not be invoked to exclude evidence extrinsic to the agreement which would tend to show that the language under scrutiny is not clear and unambiguous when viewed in light of the extrinsic evidence. As cogently stated by Judge Roger Traynor in *Pacific Gas & Electric Co. v. G. W. Thomas Drayage Co.*, 69 Cal. 551, 442 P.2d 641 (1968):

> The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible.

The Board believes that the dispute it must resolve here presents just such a situation. The bargaining history surrounding the disputed language tends to support the Organization's interpretation of that language. The language, in light of the bargaining history, is reasonably susceptible of the interpretation urged by the Organization. The Board must conclude that the disputed language is not so clear and unambiguous, in light of the bargaining history surrounding it, as to preclude the Board's consideration of the bargaining history as part of the Board's inquiry as to the true meaning of the language.

Analysis of the bargaining history reveals that for many years prior to 1973 the following paragraph appeared as Section 15E in agreements between the Carrier and the Organization:

> In the event of occupational injury, the affected pilot agrees that the Company may deduct from his pay an amount equal to the weekly Workmen's Compensation benefits received by him under applicable law during the period covered by his sich leave pay.

In 1973 the parties added the following two paragraphs preceeding the paragraph quoted above:

> Effective January 1, 1974, all pilots who have completed one (1) year of service will have sixty (60) hours of occupational sick leave banked and continue to accrue occupational sick leave at five (5) hours per month to a maximum of three-hundred-sixty (360) hours. Effective January 1, 1974, all pilots with less than one (1) year of service will have accrued five (5) hours per month for each month of

service as a pilot and continue to accrue five (5) hours per month to a maximum of three-hundred-sixty (360) hours.

Pay and credit for such occupational leave shall be computed on the same basis as sick leave pay and charges against occupational leave credit shall be made on the same basis as charges against sick leave credit. Occupational leave shall be used prior to sick leave. However, an employee shall not be permitted to use any of his occupational leave credit for sick leave.

In 1975 the parties modified the first two paragraphs of Section 15E as follows:

Pilots shall accrue five (5) hours occupational sick leave credit for each month of employment as a pilot with the Company until three hundred sixty (360) hours have been accrued.

When the Company determines that an employee has an occupational injury, such employee shall be eligible for occupational injury pay. Pay and credit for such occupational leave shall be computed on the same basis as sick leave pay and charges against occupational leave credit shall be made on the same basis as charges against sick leave credit. Occupational leave shall be used prior to sick leave. However, an employee shall not be permitted to use any of his occupational leave credit for sick leave.

The language of Section 15E as it appeared in the 1975 agreement has appeared in all subsequent agreements.

In administering Section 15E as modified in the 1973 agreement, the Carrier established the practice of requiring an injured pilot as a condition precedent to qualifying for occupational sick leave to procure a determination from the appropriate state agency that the injury was compensable under applicable state Workmen's Compensation law. Apparently this practice caused problems for the pilots in terms of inor-

dinate delay in obtaining occupational sick leave. Additionally, some pilots simply were not interested in progressing a Workmen's Compensation claim.

On May 6, 1975, the Organization served notice to open negotiations for the 1975 agreement. The Organization proposed that Section 15 governing sick leave be opened ". . . for improvement, clarification, and procedural changes." The Organization proposed to change Section 15E as follows:

E. Unchanged

E.1. Change to read as follows:

Upon notification to the Company of a pilot's occupational illness or injury, such pilot shall be allowed occupational sick leave withdrawal for flight pay and credit computed and paid on the same basis as charges against sick leave. Occupational sick leave shall be used prior to sick leave.

E.2. Change to read as follows:

The Company may deduct from a pilot's pay an amount equal to the weekly Workman's Compensation benefits received by him under applicable law during the period covered by his occupational sick leave pay. However, the amount of such deduction shall not be considered as changed against the pilot's accumulated occupational sick leave.

The Carrier's response was to maintain a "book position," *i.e.*, adherence to the provisions as they read in the 1973 agreement, with respect to all of Section 15.

The Carrier and the Organization adhered to their respective positions on Section 15 until July 30, 1975. On that date the Carrier verbally stated with respect to Section 15E that it would determine whether a pilot had suffered an occupational injury.

Either that afternoon or the following day the Carrier reduced its proposal to writing, and the Organization accepted it on July 31, 1975. The Carrier's written proposal thus became the language of Section 15E in the 1975 agreement.

At the hearing in this matter there was testimony by members of each negotiating committee as to the intent of the parties' proposals.

According to the Organization's committee man the Organization intended by its proposal to sever all ties between occupational injury pay under Section 15E of the agreement and compensability of an injury under applicable Workmen's Compensation law. The Organization also intended its proposal to expedite claims for occupational injury pay by a procedure whereby the Carrier would initially grant occupational injury pay to a claimant with the understanding that the Carrier could convert the pay to sick leave if after investigation the Carrier determined the pilot had not suffered an occupational injury. The determination the Organization contemplated the Carrier would make as to whether a pilot had suffered an occupational injury was whether such an injury had occurred on the job.

The Carrier's committee man testified that the Carrier intended by its proposal that it would determine whether a pilot had suffered an occupational injury and in so doing follow the procedure desired by the Organization for the expeditious handling of occupational injury claims. However, the Carrier never intended to abandon its practice of making eligibility for occupational injury pay contingent upon compensability of the injury under applicable Workmen's Compensation law. The Carrier intended that there be no change in the standard for determining eligibility for occupational injury pay.

The record indicates that each party believed its position prevailed when the parties settled on the language of Section 15E. However, such beliefs, no matter how reasonably and

firmly held, do not resolve the issue as to the meaning of Section 15E. As determined above that meaning is not clearly established by the language of the Section. Nor is that meaning conclusively established by bargaining history.

Under these circumstances the Board feels constrained to apply the generally recognized rule of agreement interpretation that language will be interpreted against the party who drafted it. The Board believes the rule is particularly applicable to this dispute in view of the fact that the Carrier did not explain its proposal to the Organization other than to say that the Carrier would make the determination as to whether an employee had suffered an occupational injury, although the Carrier knew that the Organization was seeking a complete disassociation of eligibility for occupational injury pay from compensability of the injury under Workmen's Compensation law. When the rule is applied to this dispute the Orgainization's interpretation of Section 15E must prevail.

Contrary to the Carrier's contention the Board does not view this as a case where by virtue of this Award the Organization is being granted what it could not obtain through negotiations. The Organization clearly believed it had achieved its objective. The Carrier never told the Organization it had not. The application of the rule that contract language will be interpreted against its author to the facts of this dispute vitiates the Carrier's argument. Nor is the letter from AlPA's Counsel to the Carrier stating that Captain Behnken's grievance would be held in abeyance until he received a ruling on his Workmen's Compensation claim evidence that occupational injury pay under Section 15E is conditioned upon compensability of the injury under applicable Workmen's Compensation law. At best it is evidence that Captain Behnken had chosen to follow the course of action rightly or wrongly required by the Carrier, a decision which he obviously changed. Furthermore, whatever relationship may have existed between occupational injury pay and Workmen's Compensation law in the parties' agreements

prior to 1975, the interpretation of the 1975 agreement resulting from application of the rule construing the language of a contract proposal against its author forces the conclusion that such relationship did not survive negotiations for the 1975 agreement. Finally, application of the rule and the resulting interpretation renders irrelevant any issue as to whether Captain Gerber cooperated with the adjusting company in the investigation of his injury. Without such investigation the record establishes that his injury occurred on the job and that the Carrier had knowledge of that fact.

There remains the question of whether Captain Gerber is entitled to occupational injury pay under Section 15E for his reinjury which occurred at home. The Carrier points to what it terms a conflict in Captain Gerber's testimony as to how the injury recurred. At first Captain Gerber testified the injury recurrred when he got off a couch. Later he testified it recurred while he was doing sit-ups as a part of therapy for the original injury. Whichever version is correct, the physician's report indicates that it was a recurrence of his original injury. The Carrier made no argument that a recurrence of an injury should be treated any differently than the original injury for purposes of Section 15E. Nor is there any evidence that the agreement so contemplates. Accordingly, the grievance is sustained with respect to Captain Gerber's claim for occupational injury pay for time lost due to the recurrence of the injury.

AWARD

Both grievances are sustained. Grievants are to be compensated from the occupational injury leave bank for all time lost as a result of their injuries.

William E. Fredenberger, Jr.
Neutral Referee

Thaddeus Belsher
Association Board Member
Concurring (x): Dissenting ( )

DATED: 18 May, 1983

Richard T. Young
Carrier Board Member
Concurring ( ): Dissenting (x)

DATED: May 11, 1983

Ernest M. Holman
Association Board Member
Concurring (x): Dissenting ( )

DATED: 5/20/83

Lyman L. Peters
Carrier Board Member
Concurring ( ): Dissenting (x)

DATED: 16 May, 1983

Supreme Court, U.S.
FILED
SEP 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-293

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

OZARK AIR LINES, INC.,
Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

DANIEL S. KOZMA
Air Line Pilots Association, Int'l
1625 Massachusetts Ave. N.W.
Washington, D.C. 20036
(202) 797-4107
Attorney for Respondent

September 1985

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT 4

CONCLUSION 13

TABLE OF AUTHORITIES

CASES: Page

Andrews v. *Louisville & Nashville R.R. Co.*, 406 U.S. 320 (1972) 5

Brotherhood of Locomotive Engineers v. *Louisville & Nashville R.R. Co.*, 373 U.S. 33 (1963) 5

Gateway Coal Co. v. *UMWE*, 414 U.S. 368 (1974) 5

Gunther v. *San Diego & Arizona Eastern R. Co.*, 382 U.S. 257 (1965) 6

Int'l Assn. Machinists v. *Central Airlines*, 373 U.S. 682 (1963) 5

International Union v. *White Motor*, 505 F.2d 1193 (8th Cir. 1974) 8, 10

John Wiley & Sons v. *Livingston*, 376 U.S. 543 (1964). 11

Loveless v. *Eastern Air Lines*, 681 F.2d 1272 (11th Cir. 1982) 8, 10

Ludwig Honold Mfg. Co. v. *Fletcher*, 405 F.2d 1123 3rd Cir. 1969) 10, 11

Nolde Bros. v. *Bakery Workers*, 430 U.S. 243 (1977) .. 5

Order of Railway Conductors v. *Pitney*, 326 U.S. 561 (1946) 11

Rainbow Glass Co. v. *Local Union No. 610*, 663 F.2d 814 (8th Cir. 1981) 10

Riceland Foods v. *United Brhd. of Carpenters*, 737 F.2d 758 (8th Cir. 1984) 12

St. Louis Theatrical Co. v. *St. Louis Theatrical Brotherhood Local 6*, 715 F.2d 405 (8th Cir. 1983) 8

Torrington Co. v. *Metal Products Workers Local 1645*, 362 F.2d 677 (2d Cir. 1966) 7, 8, 10

Union Pacific Railroad v. *Price*, 360 U.S. 601 (1959) .. 11

TABLE OF AUTHORITIES continued

Page

Union Pacific R.R. Co. v. *Sheehan*, 439 U.S. 89 (1978).. 6, 11, 12

United Electrical, Radio & Machine Workers of America, Local 1139 v. *Litton Microwave Products*, 728 F.2d 970 (8th Cir. 1984) 12

United Steelworkers v. *American Mfg. Co.*, 363 U.S. 564 (1960) 4

United Steelworkers v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960) 4, 9

United Steelworkers v. *Warrior & Gulf Navigation*, 363 U.S. 574 (1960) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-293

OZARK AIR LINES, INC.,

Petitioner,

v.

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR RESPONDENT AIR LINE PILOTS ASSOCIATION, INTERNATIONAL IN OPPOSITION

STATEMENT OF THE CASE

Respondent Air Line Pilots Association ("ALPA") accepts Petitioner's statement of the case with the following additions and modifications.

Ozark Airlines and ALPA are parties to successive collective bargaining agreements that establish both a

regular and an occupational sick leave policy for Ozark's pilots. Regular sick leave may be taken at any time, while occupational sick leave is available only when a pilot suffers an "occupational injury." Under the agreement Ozark makes the determination whether a particular injury is an "occupational injury," but the term "occupational injury" is not expressly defined anywhere in the agreement. *See,* Appendix E, p. A-26, Petition for Certiorari.

Section 28 of the collective bargaining agreement also establishes an Adjustment Board, an arbitration panel required by the Railway Labor Act, for the purpose of resolving disputes arising from the interpretation or application of the contract. 45 USC §§ 153, 184. Section 28 provides that the Board's decisions "shall be final and binding upon the parties." *See also,* 45 USC § 153(m).

In 1978 and in 1981 ALPA filed grievances challenging Ozark's refusal to grant occupational sick leave, to two pilots who were admittedly injured while at work. Appendix F, p. A-29. Ozark denied the grievances and ALPA appealed to the Adjustment Board. Ozark, however, objected to the Board's jurisdiction and moved to dismiss the grievance arguing that the language of the agreement "When the company determines . . ." gave Ozark final, unfettered and unreviewable discretion to determine whether any pilot was eligible for occupational sick leave. Appendix D, pp. A-18-19; Appendix F, pp. A-28-29. Predictably, the four partisan Board members deadlocked on this issue and at ALPA's request a fifth neutral member was appointed by the National Mediation Board to break the deadlock. Appendix D at p. A-19. After a hearing, the Board ruled that the grievance was arbitrable.

Ozark then demanded that the neutral withdraw and that the case be remanded to the partisan four man Board for a hearing on the merits. ALPA objected to this procedure and argued that the neutral had been appointed to resolve the grievances, not just the preliminary jurisdictional question raised by Ozark. The Board ruled in ALPA's favor and the five man Board, as constituted, proceeded to hear the grievances. Appendix F at p. A-28.

Ozark again raised its contention that the language "when the company determines . . ." left it free to make any determination it saw fit, without review. Alternatively, Ozark argued that the term "occupational injury," because of past practice, required application of the strict standards of Missouri's Workmen's Compensation law in order to determine if an occupational injury occurred. *See Ozark's Petition for Writ of Certiorari* at pp. 3-4. In other words, Ozark argued that a pilot qualified for occupational sick leave only if his injury were compensable under state workmen's compensation law. *Id.;* Appendix F at p. A-32. ALPA, on the other hand, consistently argued that the term "occupational injury" means nothing more than an injury that occurred while on the job. Appendix F at p. A-31. After a full hearing, the Board ruled in ALPA's favor on the merits and found that the grievants were entiled to occupational injury pay. Appendix F.

Ozark refused to comply, commenced an action to vacate the award and ALPA counterclaimed to enforce it.

Ozark's contentions were rejected by the district court and by the panel of the Court of Appeals. Ap-

pendices B, E. However, the Court of Appeals granted rehearing en banc and, after argument, divided equally on the case. As a consequence, however, the Court vacated the prior panel opinion, published at 744 F.2d 1347 (1984), and affirmed the district court's judgment without opinion or comment. Appendix A at p. A-2.

In its Petition for Certiorari, received by ALPA on August 21, 1985, Ozark has abandoned its contention that the five man Board acted improperly by hearing the grievances on the merits without first remanding them to the partisan four member Board. Ozark's only contention here is that the District Court and Court of Appeals acted improperly when they failed to set aside a Railway Labor Act Adjustment Board arbitration decision because the Board, in Ozark's view, exceeded its jurisdiction by examining negotiating history in order to interpret "unambiguous" contract language. As we will now show, however, nothing in this case warrants this Court's intervention.

ARGUMENT

In its Petition for Certiorari Ozark asks this Court to "clarify the principles governing review of arbitration awards [in labor cases] previously stated in *Enterprise Wheel.*" Petition at 9. However, Petitioner is wrong in asserting that this case is governed by principles established in the Steelworkers Trilogy. *United Steelworkers* v. *American Mfg. Co.,* 363 U.S. 564; *United Steelworkers* v. *Warrior & Gulf Navigation,* 363 U.S. 574; *United Steelworkers* v. *Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960). The Trilogy arose under a different statute, the National Labor Relations Act, ("NLRA") 29 USC § 101, *et seq.,* where

arbitration of labor disputes is favored by federal labor policy, but is voluntary between the parties. *Nolde Bros.* v. *Bakery Workers,* 430 U.S. 243, 254 (1977); *Gateway Coal Co.* v. *UMWE,* 414 U.S. 368, 377 (1974).

The Railway Labor Act, ("RLA") on the other hand, *specifically requires* the arbitration of contract disputes before Adjustment Boards. 45 U.S.C. §§ 153, 184. *Brotherhood of Locomotive Engineers* v. *Louisvillle & Nashville R.R. Co.,* 373 U.S. 33, 38 (1963); *Intn'l Assn. Machinists* v. *Central Airlines,* 373 U.S. 682 (1963); *Andrews* v. *Louisville & Nashville R.R. Co.,* 406 U.S. 320 (1972). The RLA specifies that the awards of Adjustment Boards "shall be final and binding upon both parties to the dispute," and that Adjustment Boards are empowered to issue orders "to make the award effective." 45 USC § 153, First (m) (o). The RLA also provides that the district courts may entertain actions to enforce board awards and to review them, but only to the following, very limited extent:

> [The court may] enforce or set aside the order of the division of the Adjustment Board; *Provided, however,* That such order may not be set aside except for (1) failure of the division to comply with the requirements of this chapter, (2) for failure of the order to conform or confine itself, to matters within the scope of the division's jurisdiction, or (3) for fraud or corruption by a member of the division making the order.
>
> 45 USC § 153, First (p) and (q).

Thus, this Court has instructed that contract disputes subject to the Railway Labor Act are "finally, completely and irrevocably settled by the [Adjustment]

Board's decision" and that the federal courts must enforce Adjustment Board awards, like the award Ozark challenges here, unless one of the three statutory grounds is established. *Gunther* v. *San Diego & Arizona Eastern R. Co.*, 382 U.S. 257, 261 (1965). Only six years ago, this Court once again reaffirmed this standard of review describing it as "among the narrowest known to the law." *Union Pacific Railroad Co.* v. *Sheehan*, 439 U.S. 89, 93 (1979):

> Section 153, First (q) unequivocally states that the "findings and order of the [Adjustment Board] shall be conclusive on the parties" and may be set aside only for the three reasons specified therein. We have time and again emphasized that this statutory language means just what it says. (citations omitted)
>
> *Sheehan, supra.*

Both of the courts below applied these settled principles in this case. *See* Appendix D, pp. A-19-21; Appendix B at pp. 6-7. Petitioner is not, therefore, seeking a "clarification" of the principles of review applicable to Railway Labor Act Adjustment Board awards. Instead, Ozark seeks a relaxation of the narrow, statutorily mandated standard of review so that successful challenges to arbitral awards will no longer depend on "rare circumstances," and judicial review will be reestablished and expanded "over the concededly broad powers of arbitrators." Petition at p. 9.

Ozark advances two contentions in support of its Petition for Certiorari: First is the contention that the Eighth Circuit Court of Appeals has "so substantially deviated" from established judicial principles that judicial review of arbitration awards has been

"eliminate[d]." Second, that the decision in this case conflicts with the decision in *Torrington Co.* v. *Metal Products Workers Local 1645,* 362 F.2d 677 (2d Cir. 1966). *See,* Petition at p. 13.

Neither contention is true nor do they support any action or intervention by this Court. First, and perhaps most important, is the fact that the Eighth Circuit Court of Appeals has issued *no* decision and *no* opinion in this case. The Eighth Circuit Court of Appeals en banc expressly noted that the panel opinion at 744 F.2d 1347 (1984) was vacated and simply affirmed the district court's *judgment* by an equally divided vote. (Appendix A at A-2). Thus, there is *no* published opinion or decision of the Court of Appeals that follows, deviates or affects in any way established legal principles, or that can be said to be in conflict with *Torrington,* or any other decision. Moreover, the Court of Appeals action in affirming the judgment of the district court, without mention of the district court's opinion, leaves even that unpublished decision with little, if any, precedential value.

As a result of the Court of Appeal's action after rehearing en banc, nothing has happened and nothing has changed, in a jurisprudential sense, because of this case. There is, therefore, nothing for this Court to correct or to do here.

Second, there has been no deviation from established principles. Ozark's principal contention in this regard seems to be that the arbitrator failed to enforce "unambiguous" contract language. *See,* Questions Presented for Certiorari, *Petition* at p. i. Since some courts have refused to enforce arbitration awards contrary to "unambiguous" contract language, Ozark argues that

established principles have not been honored. *See, e.g., Torrington, supra; St. Louis Theatrical Co.* v. *St. Louis Theatrical Brotherhood Local 6,* 715 F.2d 405 (8th Cir. 1983) (awards set aside; contrary to unambiguous language); *contra, Loveless* v. *Eastern Air Lines,* 681 F.2d 1272 (11th Cir. 1982); *International Union* v. *White Motor,* 505 F.2d 1193 (8th Cir. 1974) (awards enforced; contrary to language, but latent ambiguity found and award supported by negotiating history or other extrinsic evidence). This argument might have some merit if there was agreement that the disputed language was, indeed, unambiguous.

However, the central dispute between the parties was the meaning of the contract language: "When the Company determines that an employee has an occupational injury . . ." At least three different interpretations of that language were presented to the Board. *See supra,* at pp. 2-3; Appendix F at pp. 31-32. The Adjustment Board concluded that the language was ambiguous and that the evidence of negotiating history supported ALPA's claim that this recently negotiated, disputed language was intended to do two things: (1) to require Ozark to make the "occupational injury" determination without awaiting a decision by the state Workmen's Compensation agency, and (2) to sever the previous connection between eligibility for "occupational" sick leave and compensability under state Workmen's Compensation law. Appendix F at pp. 30-38.

Ozark attempts to support its claim that the language is clear with the misleading contention that the Board found the disputed language to be unambiguous. Petition at pp. 6-7. However, it is only by taking the

Board's language out of context, that Ozark suggests a result directly contrary to the Board's true conclusion:

> "The language, in light of the bargaining history, is reasonably susceptible of the interpretation urged by [ALPA]. The Board must conclude that *the disputed language is not so clear and unambiguous* . . . as to preclude the Board's consideration of bargaining history . . ."
>
> Appendix F at p. 34. (emphasis supplied)

Later, both the district court and the panel of the Court of Appeals agreed with the Board that the contract was ambiguous. For example, the panel majority stated at 744 F.2d at 1349:

> The agreement nowhere defines "occupational injury." Neither is the language "when the Company determines that an employee has an occupational injury" so clear and explicit a reservation of exclusive authority to Ozark as to preclude the board from looking to plainly relevant extrinsic sources or discern what the parties meant by the language. Confronted by a dispute between the parties over the meaning of the provision, the Board had the authority to look beyond the language of the agreement to determine the meaning of the terms in question.

Of course, these statements do not represent a deviation from established principles. On the contrary, the Adjustment Board, the district court and the Court of Appeals were simply following this Court's pronouncement in the *Trilogy* that labor arbitrators "may of course look for guidance from many [extrinsic] sources" when interpreting bargaining agreements. *Enterprise Wheel and Car, supra,* 363 U.S. at 597.

Accord: Rainbow Glass Co. v. *Local Union No. 610,* 663 F.2d 814, 817 (8th Cir. 1981); *White Motor, supra; Loveless, supra; Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1130 (3rd Cir. 1969). Circuit Judge McMillian, the panel's dissenter, expressed agreement with the rule that an "arbitrator may look for guidance outside the terms of the agreement to extrinsic or collateral sources, if there is a latent ambiguity." 744 F.2d at 1351. He dissented, not because he believed the majority deviated from the proper rule, but because he did not see any ambiguity; "the language . . . is plain and unambiguous." *Id.* Thus, there is no disagreement at all over the applicable rule of decision here, nor is there a conflict with the *Torrington* case. Instead, the real disagreement is whether the disputed contract language is ambiguous.

Similarly, the "conflict" with *Torrington* is simply a difference in outcome after application of this settled principle to the different factual situations found in the two cases: If disputed contract language is ambiguous an arbitrator may resort to extrinsic evidence, and if the contract is unambiguous, he may not. Thus, Ozark is asking this Court to involve itself in the *application* of settled legal principles to the discrete facts of this case and the unique, disputed contract language. Of course, there are no "special and important reasons" for this Court to address the extremely narrow question of the correct application of an undisputed legal principle to the text of an unusual phrase found in one collective bargaining agreement. Rule 17.1 Supreme Court Rules.

The real question raised by Ozark is the appropriate scope of review applicable to an arbitrator's deter-

mination that particular contract language is ambiguous. Ozark would apparently allow a greater scope of review by federal courts of such arbitral determinations and would limit findings of "ambiguity to situations where there are "tensions between sections of the agreement or an ambiguity within a section." Petition at p. 7. Of course, ambiguity is not always so readily circumscribed. *See, generally, Ludwig Honold Mfg. Co.* v. *Fletcher,* 405 F.2d 1123, 1130 (3d Cir. 1969). Moreover, Ozark's desire for closer judicial review of labor arbitrators' determinations of "ambiguity" *vel non* and its attempt to carve out a class of issues—determinations of ambiguity—where labor arbitrators are more closely confined and limited in their decision making, is no different than similar attempts—rejected in the past by this Court—to distinguish categories of "purely legal issues" or "question[s] of procedure" where, it was argued, arbitrators should be more closely confined and judicial review should be broader. *Union Pacific R.R. Co.* v. *Sheehan,* 439 U.S. 89, 91 (1978); *John Wiley & Sons* v. *Livingston,* 376 U.S. 543 (1964). However, Ozark has articulated no better reasons for relaxing the standard of review applicable to arbitrators' determinations of ambiguity than those rejected in *Sheehan* and *John Wiley, supra.*

Nor is there any support in the Railway Labor Act for the idea that a particular class of Adjustment Board determinations can be singled out for greater judicial scrutiny. On the contrary, *all* contract disputes under the Railway Labor Act are decided by Adjustment Boards, not by the courts. *Order of Railway Conductors* v. *Pitney,* 326 U.S. 561 (1946); *Union Pacific Railroad* v. *Price,* 360 U.S. 601 (1959). Furthermore,

all Adjustment Board decisions are subject to the same, unchanging standard of review set forth in 45 USC § 153, First (p) and (q). Thus, the Board's determination here, that disputed language is ambiguous, is no different than the determination in *Sheehan* that this Court held "falls within the . . . language [of the statute] precluding judicial review." *Sheehan, supra,* at p. 94.

Finally, Petitioner argues that the Eighth Circuit has evidenced some confusion on the issue of the standard of review applicable to labor arbitration decisions, noting that the Court decided two other cases in 1984, *en banc,* that raised similar issues. *See* Petition at pp. 8-10. We note first that neither of the two cases identified by Petitioner arose under the Railway Labor Act. *Id.; see, Riceland Foods* v. *United Brhd. of Carpenters,* 737 F.2d 758 (8th Cir. 1984); *United Electrical, Radio and Machine Workers of America, Local 1139* v. *Litton Microwave Products,* 728 F.2d 970 (8th Cir. 1984). Moreover, even if the Petitioner's contention is true, no mischief has been done by the Court of Appeals internal problems that would warrant this Court's intervention in this case. As noted earlier, the Court of Appeals issued no decision or opinion and the outcome has been enforcement of the Adjustment Board award—clearly the outcome mandated by the Railway Labor Act, absent extraordinary circumstances not present here.

CONCLUSION

Ozark has identified no issues of consequence arising from this case and there are none. There is no decision or opinion of the Court of Appeals and, thus, no effect on, deviation from, or conflict with established legal principles or the decisions of other Courts of Appeals. On the contrary it is Ozark, in this Petition, that seeks an unwarranted and fundamental change in the long settled rule of law applicable to the judicial review of labor arbitration awards rendered by Adjustment Boards created pursuant to the Railway Labor Act. However, that rule of law, established by statute, has served well covered employers, their employees and the public interest. Ozark has set forth no reasons to reexamine that rule now and the petition for a writ of certiorari in No. 85-293 should, therefore, be denied.

Respectfully submitted,

DANIEL S. KOZMA

Air Line Pilots Association, Int'l
1625 Massachusetts Ave. N.W.
Washington, D.C. 20036
(202) 797-4107

Attorney for Respondent

September 1985